No. 87-1467

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

EXXON COMPANY, U.S.A.,
A DIVISION OF EXXON CORPORATION,

Petitioner,

—against—

BANQUE DE PARIS ET DES PAYS-BAS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTION PRESENTED

Did the United States Court of Appeals for the Fifth Circuit properly deny a second request for rehearing which was premised solely on an unpublished decision by a Texas intermediate appellate court having no precedential value in the Texas state courts?

RULE 28.1 STATEMENT

The parent, principal affiliates and non-wholly-owned subsidiaries of respondent are listed in Appendix 1.

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Rule 90(i), Texas Rules of Appellate Procedure ..... *passim*

28 U.S.C. § 1652 (1982) 3

Treatise

1A J. Moore, W. Taggart, A. Vestal & J. Wicker, *Moore's Federal Practice* ¶ 0.307, at 3097 (2d ed. 1987) 3-4

RULE INVOLVED

This petition for certiorari involves Rule 90 of the Texas Rules of Appellate Procedure, subsection (i) of which reads as follows:

> **Unpublished Opinions.** Unpublished opinions shall not be cited as authority by counsel or by a court.

The full text of Rule 90 is reprinted in Appendix 2.

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—against—

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ON PETITION FOR A WRIT OF CERTIORARI TO THE
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BRIEF IN OPPOSITION

CERTIORARI SHOULD BE DENIED BECAUSE THE FIFTH CIRCUIT ACTED PROPERLY IN REFUSING REHEARING ON THE BASIS OF AN OPINION WHICH IS WITHOUT PRECEDENTIAL VALUE

This case concerns the non-payment by respondent ("Paribas") of a letter of credit first presented to it for payment a month after its stated expiry date. The Fifth Circuit, relying in substantial part on well-settled principles of Texas law,[1] held

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1 In addition to various sections of the Texas Business and Commercial Code, the Fifth Circuit relied on *Republic Nat'l Bank* v. *Northwest*

that payment was not required, even though petitioner ("Exxon") might not have been able to present the documents called for by the letter of credit before the expiry date. After judgment was rendered below, Exxon filed with the Fifth Circuit a suggestion for en banc consideration. On December 8, 1987, the Fifth Circuit denied that application and, treating it as a petition for a panel rehearing, denied that application also. *Exxon Co., U.S.A.* v. *Banque de Paris et des Pays-Bas*, 828 F.2d 1121 (5th Cir.), *reh'g en banc denied*, 835 F.2d 1433 (1987).

In January 1988, Exxon discovered an unpublished opinion which had been issued by a Texas court of appeals, an intermediate level appellate court, on November 17, 1987. The opinion bore the notation "Do not publish. Tex. R. App. P. 90(e)." *See* Exxon's Petition for a Writ of Certiorari ("Pet."), App. D at 28a.[2] Exxon brought the unpublished opinion to the attention of the Fifth Circuit in the form of a motion to recall the Fifth Circuit's mandate and a motion for leave to file a second suggestion for en banc consideration. The Fifth Circuit denied both motions on February 12, 1988.[3]

Nat'l Bank, 578 S.W.2d 109 (Tex. 1978); *B.A. Commercial Corp.* v. *Hynutek, Inc.*, 705 S.W.2d 713 (Tex. App.—Dallas [5th Dist.] 1986, no writ), and the following federal decisions, all of which also applied Texas law: *Richland Plantation Co.* v. *Justiss-Mears Oil Co.*, 671 F.2d 154 (5th Cir. 1982); *East Girard Sav. Ass'n* v. *Citizens Nat'l Bank & Trust Co.*, 593 F.2d 598 (5th Cir. 1979); and *Chevron Oil Co.* v. *E.D. Walton Constr. Co.*, 517 F.2d 1119 (5th Cir. 1975). None of these authorities was questioned or modified by the unpublished decision now relied on by Exxon.

2 The Texas court of appeals re-affirmed its decision not to publish its opinion when, on January 27, 1988, it denied a motion by one of the parties in that case to publish the opinion. *See* Appendix 3.

3 Thereafter, on the same day that Exxon filed its petition for certiorari, Exxon filed in the Texas Supreme Court (as an "amicus curiae") a motion seeking publication of the court of appeals' opinion, as well as a brief in connection with the application for a writ of error. In its motion to publish, which is still pending, Exxon misstates the facts of

Exxon now seeks a writ of certiorari based solely upon that unpublished decision. Under Texas law, however, the "do not publish" opinion is of no precedential value and is not to be cited as authority either by counsel or the court. Rule 90(i), Texas Rules of Appellate Procedure, App. 2 at A-8; *Berry* v. *Berry*, 647 S.W.2d 945 (Tex. 1983).

In *Berry*, the Supreme Court of Texas declared that an "unpublished . . . opinion is of no precedential value and should not be cited." 647 S.W.2d at 947. As a Texas court of appeals has said: "An unpublished opinion of this Court or any other court has no authoritative value." *Wheeler* v. *Aldama-Luebbert*, 707 S.W.2d 213 (Tex. App.—Houston [1st Dist.] 1986). That Exxon has chosen deliberately to rely on a case devoid of precedential value and, in the process, to violate the Texas Rules of Appellate Procedure both in the Fifth Circuit and in this Court should not give Exxon greater rights than it would have if it complied with the requirements of Texas law.

The Rules of Decision Act directs federal courts to regard as the rules of decision the substantive laws of the appropriate state except where the Constitution or treaties of the United States or Acts of Congress provide otherwise. 28 U.S.C. § 1652 (1982). A federal court exercising diversity jurisdiction must therefore follow and apply state law as it would be applied by the state courts. *Erie R. R. Co.* v. *Tompkins*, 304 U.S. 64, 78 (1938). In determining state law, however, "a federal tribunal should be careful to avoid the 'danger' of giving 'a state court decision a more binding effect than would a court of that state under similar circumstances.' " *McKenna* v. *Ortho Pharmaceutical Corp.*, 622 F.2d 657, 662 (3d Cir.) (quoting 1A J.

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this case when it says "The Fifth Circuit denied Exxon's motions *solely* because the decision of the Amarillo Court of Appeals in this case is unpublished." (Emphasis Exxon's). Of course, the Fifth Circuit's order denying Exxon's motion to recall the mandate makes clear, by the use of the phrase "inter alia", that the Fifth Circuit had one or more additional reasons for denying the motion. *See* Pet., App. F at 29a.

Moore, W. Taggart, A. Vestal & J. Wicker, *Moore's Federal Practice* ¶ 0.307, at 3097 (2d ed. 1987)), *cert. denied*, 449 U.S. 976 (1980).

Giving credence to unpublished opinions when the state courts would not is just such a danger. *King* v. *Order of Travelers*, 333 U.S. 153 (1948); *Southern Ry. Co.* v. *Foote Mineral Co.*, 384 F.2d 224 (6th Cir. 1967). In *King*, this Court approved the Fourth Circuit's refusal to follow an unpublished decision of the South Carolina Court of Common Pleas. Even though South Carolina did not have a rule comparable to Rule 90(i) of the Texas Rules of Appellate Procedure, this Court held unanimously that the federal courts were not required to follow the unpublished South Carolina decision because of the inability of the bench and bar generally to have access to such unpublished opinions and because the South Carolina courts themselves afforded little precedential weight to such decisions. As stated by Chief Justice Vinson:

> [A]s we have but recently had occasion to remark, a federal court adjudicating a matter of state law in a diversity suit is, "in effect, only another court of the State" [citing *Guaranty Trust Co.* v. *York*, 326 U.S. 99, 108 (1945)]; it would be incongruous indeed to hold the federal court bound by a decision which would not be binding on any state court.

King, 333 U.S. at 161. In *Southern Ry.*, the Sixth Circuit concluded, on the basis of *King*, that it was not required to follow an unpublished decision by even the state's highest court (*i.e.*, the Tennessee Supreme Court) because such a decision would not be considered binding precedent in that state.

Unpublished opinions of Texas courts are simply not part of the jurisprudence of Texas which the federal courts are required to follow. When the Fifth Circuit denied Exxon's motion to recall the mandate because of, *inter alia*, Rule 90(i) of the Texas Rules of Appellate Procedure, the Fifth Circuit fully complied with the requirements of *Erie*, in that it gave the unpublished opinion exactly the same dignity and weight as it would have been accorded in a Texas state court—none whatsoever.

CONCLUSION

The fact that the Fifth Circuit did exactly what Texas law called upon it to do is not an appropriate basis for the invocation of the supervisory jurisdiction of this Court. The petition for certiorari should be denied.

Respectfully submitted,

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APPENDICES

APPENDIX 1

Parent, Principal Affiliates and Non-Wholly-Owned Subsidiaries of BANQUE PARIBAS (formerly called Banque de Paris et des Pays-Bas)

Parent:

Compagnie Financiere de Paribas

Principal Affiliates and Subsidiaries Not Wholly-Owned*:

Aqualand
Avenir Electronique "AVELEC"
Avenir Participations "AVEPAR"

Banco Amazonas
Banque Continentale du Luxembourg
Banque de Bienne
Banque Franco-Yougoslave
Banque Ottomane
Banque Paribas
Banque Paribas (Belgique) S.A.
Banque Paribas Cameroun
Banque Paribas Capital Markets, Ltd.
Banque Paribas Cote d'Ivoire
Banque Paribas Deutschland OHG
Banque Paribas du Canada
Banque Paribas Gabon
Banque Paribas Luxembourg S.A.
Banque Paribas Norge
Banque Paribas N.V.
Banque Paribas Pacifique
Banque Paribas Polynesie
Banque Paribas (Suisse) S.A.
Banque Paribas Sverige
Banque Parisienne et Internationale

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* Excludes companies in which the interest of Compagnie Financiere de Paribas is less than 5% or $1 million.

Banque Petrofigaz
Banque Pouyanne
Banque Sudameris
Bridel Emile
Bureau d'Etudes et de Transactions Immobilieres
Caisse Centrale de Reescompte
Campenon Bernard
Carbone Lorraine
Cellulose du Rhone et d'Aquitaine
C.G.I.B. Banque pour la Reconstruction et l'Equipement
Chiers Chatillon
Cie Holding pour l'Aluminium
"Cimopar" Compaganie d'Investissements Moboliers de Paribas
C.K.S. France
CN Industries
"COBEPA"

Main subsidiaries of COBEPA include the following companies:

Groupe I
Compagnie de Participation Internationale
Compagnie de Participation Internationale (Nouvelle) N.A.
CDI
Compagnie Generale Mosane
Societe Financiere de Developpement et de Participations
Libelux S.A.
Agemar S.A.
Investerings en Beleggings Maatschappij Lacourt
Vlaamse Investerings en Beleggings-Maatschappij
Financial Control International
Groupe Financier Liegois
Regio
Cosylva
Cofim
Sogespar

Courcelles Nord
Sodemeuse
Paribas Realty
Paribas Participations Limitee
Sodepa

Cofimer
Coginvest
Cometra Grands Lacs
Compagnie Arabe de Financement International
Compagnie Auxiliaire d'Enterprises et de Chemins de Fer
Compagnie Bancaire

Main subsidiaries of the Compagnie Bancaire group include the following companies:

Union de Credit pour le Batiment
Compagnie pour la Location d'Equipements Professionnels
Union Francaise des Banques "UFB"
Fonciere de la Compagnie Bancaire
Credit a l'Equipement des Menages
Locabail Immobilier
Compagnie Francaise d'Epargne et de Credit
Societe d'Investissements Immobiliers de France
Societe d'Investissements Immobiliers de France Contructions
Compagnie pour le Financement de l'Industrie du Commerce & de l'Agriculture
SICAR
Locabail Energie
Kleber Portefeuille
Cardimo
Sofarim Habitation
Locabail Finance International Ltd.
Compagnie Financiere Kleber
Cardif
Cofibail Auto

Compagnie Bancaire USA Finance Corp.
Compagnie Centrale de Financement

Compagnie de Fives-Lille
Compagnie d'Entreprises Industrielles et Commerciales
Compagnie de Participations, de Recherches et d'Exploitation Petrolieres
Compagnie Financiere de Syrie et du Liban
Compagnie Fonciere
Compagnie Franco-Marocaine
Compagnie Generale de Developpement Immobilier
Compagnie Holding pour l'Aluminium
Compagnie Metallurgique et Miniere
Compagnie de Participations, de Recherches et d'Exploitation Petrolieres Espanola
Compagnie de Participations, de Recherches et d'Exploitation Petrolieres Minera
Compagnie de Participations, de Recherches et d'Exploitation Petrolieres Norge
Compagnie Luxembourgeoise de Television "CLT"
Conseil Investissement
Corexcal Inc.
Corexland
Credit du Nord
Credit du Nord Belge
Credit Naval

Dolisos
Doux Ets
Droust Assurances

Enelfi Bretagne
Erbe S.A.
Eurafrep
Eural Spaarkas N.V.
Eurocem, Inc.

Financiere du Caz et de l'Energie
Financiere Gabonaise de Developpement Immobiler
Fougerolle

Gevaert
Groupe Bruxelles-Lambert
Groupe Credit du Nord

Main subsidiaries of the Credit du Nord group include the following companies:

Banque Nuger Pierre
Banque Nicolet, Lafanechere et de L'Isere
Union Bancaire du Nord
Banque Tarneaud Freres et Cie
Banque Joire Pajot et Martin
Caisse Generale de Depots et d'Avances
Societe Immobiliere et Financiere d'Investissements et de Coordination
Banque Lenoir et Bernard
Banque Arnaud Gaidan
Sedel
Norbail
Banque de Marches et d'Arbitrage

Historische Gebouwen
HRI Dolisos America

IHC Caland N.V. (and subsidiaries)
Immobiliere Rosiers
Immo-Paribas S.A.
Imosa
Intec Systems, Inc.
Interven
Itag

Knoedler-Modarco

Lectra Systeme
Logibail

Maneurop
Mestrezat
Multireal S.A.

Nantes Navires Participations
Neficom
Nigeria Merchant Banking Corporation
Nord-Est
Nouvelle Compagnie Financiere pour l'Outre-Mer
Novolease S.A.

OCEFI
"ODGH" Omnium de Developpement et de Gestion Holding
Omnium de Participations Bancaires Paribas "OPB-Paribas"
Omnium de Participations Financieres et
Industrielles de Paribas "Opfi-Paribas"
Onatra S.A.
Opafi
OTH

Pargelux
Paribas Asia Holding
Paribas Asia (1985) Ltd.
Paribas Bank International (Texas) Inc.
Paribas do Brazil
Paribas Europe
Paribas Finance, Inc.
Paribas Finance (Texas), Inc.
Paribas Finanziara Spa
Paribas Group Australia Pty, Ltd.
Paribas International
Paribas Investment Australia
Paribas North America, Inc.

Main subsidiaries of Paribas North America, Inc. include the following companies:

Paribas Corporation
Paribas Technology, Inc.
Paribas Asset Management Incorporated
Paribas Asset Management S.A.
Paribas International Bond Management
Paribas Futures
Paribas Properties

Paribas Participations B.V.
Paribas Securities (Panama) Inc. c/o Arias Fabrega
Paribas South East Asia Ltd.
Paribas Suisse (Bahamas) Limited
Paribas Trust Co.
Paribas U.K. Holding Limited
Paribaven

Poliet
Polydev
Prominco Holding

Quilter Goodison

Regie Immobiliere de la Ville de Paris
Robert Lefevre S.A.
Roegiers

SACI
SAGIP
S.A.I.C. Velcorex
Sait Electronics
Samaf
Saulnes-Chatillon
Scoa
Sedicecom
Segin Nord (Lille)
Sema-Metra
SFEEC
Smurfit Paribas Bank Ltd.
SNBE (Societe Nouvelle de Banque Europe)
Societe Anonyme de Gestion et d'Investissements et de Participations
Societe Anonyme de Transactions Internationales
Societe Auxiliaire de la Construction Immobiliere
Societe de Gestion d'Interets Petroliers
Societe de Participations Camerounaise
Societe de Participations Fincaires et Financieres Paribas "SPB-Paribas"
Societe de Participations Ivoirienne
Societe de Participations Techniques et Financiere
Societe de Recherche et de Financement
Societe des Ciments Francais
Societe d'Etudes Immobilieres et de Constructions
Societe d'Organisation, de Management et de Developpement pour les Industries Alimentaires et Agricoles
Societe Francaise de Sucreries au Chili
Societe Gabonaise de Participations

Societe Generale Commerciale et Financiere
Societe Generale de Financement Intercontinental
Societe Immobiliere Victoire
Societe Metallurgique de Gorcy
Societe Neo-Caledonienne de Developpement et de Participations
Societe Nouvellas Paribas International "SNPI"
Sococal
SOFIREAL
SOGEDIP
Ste Marocaine de Depots et de Credit
Sud Pacifique Miniere

Texaf Financiere Gestion
Transnucleaire

UFIBA
UGC Belgique
Union Financiere et Bancaire

Valeo
Valeurs et Rendements (Luxembourg)
Valex Petroleum, Inc.
Veninter
Vinton Oil and Gas Company

APPENDIX 2

Rule 90 of the Texas Rules of Appellate Procedure provides:

(a) Decision and Opinion. The court of appeals shall hand down a written opinion which shall be as brief as practicable but which shall address every issue raised and necessary to final disposition of the appeal. Where the issues are clearly settled, the court shall write a brief memorandum opinion which should not be published.

(b) Signing of Opinions. A majority of the justices participating in the decision of the case shall determine whether the opinion shall be signed by a justice or issued per curiam. The names of the justices participating in the decision shall be noted on all written opinions or orders handed down by a panel.

(c) Standards for Publication. An opinion by a court of appeals shall be published only if, in the judgment of a majority of the justices participating in the decision, it is one that (1) establishes a new rule of law, alters or modifies an existing rule, or applies an existing rule to a novel fact situation likely to recur in future cases; (2) involves a legal issue of continuing public interest; (3) criticizes existing law; or (4) resolves an apparent conflict of authority.

(d) Concurring and Dissenting Opinions. Any justice may file an opinion concurring in or dissenting from the decision of the court of appeals. A concurring or dissenting opinion may be published if, in the judgment of its author, it meets one of the criteria established in paragraph (c), but in such event the majority opinion shall be published as well.

(e) Determination to Publish. A majority of the justices participating in the decision of a case shall determine, prior to the time it is issued, whether an opinion meets the criteria for publishing, and if it does not meet the criteria for publication, the opinion shall be distributed only to the persons specified in Rule 91, but a copy may be furnished

to any interested person. On each opinion a notation shall be made to "publish" or "do not publish."

(f) Rehearing. If a rehearing is granted, no opinion shall be published until after the decision on rehearing is issued.

(g) Action of Court En Banc. The court en banc may modify or overrule a panel's decision with regard to the signing or publication of the panel's opinion or opinions in a particular case. A majority of justices shall determine whether written opinions handed down by the court en banc shall be signed by a justice or issued per curiam, and whether they shall be published.

(h) Order of the Supreme Court. Upon the grant or refusal of an application for writ of error, whether by outright refusal or by refusal no reversible error, an opinion previously unpublished shall forthwith be released for publication, if the Supreme Court so orders.

(i) Unpublished Opinions. Unpublished opinions shall not be cited as authority by counsel or by a court.

APPENDIX 3

[SEAL OF STATE OF TEXAS]

COURT OF APPEALS
Seventh District of Texas
Potter County Courts Building
501 Fillmore, Suite 2-A
Amarillo, Texas 79101

January 27, 1988

Mr. Kelly Bickerstaff
McCLESKEY HARRIGER BRAZILL & GRAF
P.O. Drawer 6170
Lubbock, Texas 79493

Re: Kerr Construction Company and the City of Lubbock v. The Plains National Bank of Lubbock, No. 07-86-0205-CV

Dear Mr. Bickerstaff:

In the above captioned cause, the Court this day overruled Appellee's Motion to Publish Opinion, of which you will please take due notice.

Very truly yours,

PEGGY CULP, Clerk

/s/ JoAnn Glover
JoAnn Glover, Deputy

bw

xc: Mr. Donald M. Hunt
CARR EVANS FOUTS & HUNT
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Lubbock, Texas 79408

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